UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Case No. 01-1139
	.
W. R. GRACE,	.
	. 5414 USX Tower Building
Debtor	. Pittsburgh, PA 15222
	. January 26, 2006
. . . . .	. 9:15 a.m.

TRANSCRIPT OF HEARING ON DEBTORS' FIFTEENTH OMNIBUS OBJECTION
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: Okay. We're back on the record from a continuation of yesterday and the day before's proceedings in W. R. Grace, bankruptcy number 01-1139. The parties I have listed participating by phone are Mark Casarino, Ryan Papir, Andrew Craig, Jay Sakalo, Theodore Tacconelli, John O'Connell, John Phillips, Mary Martin, Richard Park, Steven Vogel, Michael Lastowski, Alexander Henlin, Janet Bayer, Natalie Ramsey, Brian Kasprzak, Leslie Epley, Terence Edwards, Martin Dies, Christina Kang and Thomas Whalen. I'll take entries of those of you in Court, please.

MS. BROWDY: Good morning, Your Honor. Michelle Browdy for the debtors.

MR. BIANCA: Good morning, Your Honor. Salvatore Bianca for the debtors.

MR. DIERKES: Good morning, Your Honor. Michael Dierkes for the debtors.

MR. SPEIGHTS: Oh, I'm sorry, Your Honor. Dan Speights for S&R Claimants.

MR. BAENA: Good morning, Your Honor. Scott Baena, Matt Kramer on behalf of the PD Committee.

THE COURT: Ms. Browdy. Ms. Browdy, I need to make sure that we're on the same wave length about something. You know that we have to terminate at 2:00 today because I teach.

MS. BROWDY: I hope we're done far before 2:00 today.

THE COURT: Okay. Because yesterday you said

something about all afternoon and until I went home last night for some reason that hadn't hit me and I needed to make sure that we were on the same page. Okay.

MS. BROWDY: No, I appreciate that, Your Honor. My guess based on the last two days is that we may be done by 11 or so. But it's just an estimate.

THE COURT: All right.

MS. BROWDY: We are finally at the last day of our three-day property damage festival here. The first issue I want to address is just to give you a brief update on this claims processing problem that we stumbled into yesterday. We've done some preliminary investigation and we think we've identified the issue. We knew that when a claim goes in and then a supplement is made, the supplement has been getting a new claim number. And we chased that down and when our objections were made to those California claims, for example, if you look at both the initial and the supplemental neither of those have the information. What we didn't realize is if you continue to make supplements, they continue to have additional numbers.

So that tells us a couple of things. One thing is we actually have fewer claims than we thought we did because if we have 20 California claims that have been supplemented twice, those may be in our files as reflecting as many as 60 claims. So one thing we need to do is go back retrospectively and fix

that, find where the duplicates are or the amendments and collapse them down so, for example, if there's three claims numbers given to a single property, we want to collapse those down, get rid of two of the claims and have it all under one and hopefully we can come up with a mechanism and do this by agreement of counsel and get that in place. Otherwise we may need to come back to the Court. But my expectation is it's going to be a mechanical task.

And then the second thing we're going to need to do obviously is to work with the claims processing agent to make sure they're prepared to deal with this issue going forward. But I think that explains what we had stumbled into yesterday.

THE COURT: All right.

MS. BROWDY: In terms of our agenda for today, Your Honor, I'm just going to hand up a little chart for the Court.

(Pause)

MS. BROWDY: What we thought we would do, Your Honor, is first just clean up a couple items from yesterday that we continued over to today and then again that should go pretty quickly we expect, and then we'd go into the class certification.

THE COURT: All right.

MS. BROWDY: The first issue up would be the unauthorized claims. You may recall we initially objected to 38 claims for which we said that there was no authority.

Fifteen of those were withdrawn. We still have a dispute with the Speights firm as to 20 of those and my colleague, Mr. Dierkes is going to be address those. We apparently attempted to meet and confer with Mr. Speights on these unsuccessfully. So the parties still don't agree whether or not there's been authorization shown.

THE COURT: All right. All right.

MR. DIERKES: Good morning, Your Honor. Michael Dierkes on behalf of debtors. As Ms. Browdy has stated, I'm going to be addressing the 20 remaining Speights and Runyon claims for which we believe the firm didn't have authority to file them. But this -- this started -- this process started last summer back in July when we originally filed our motion for leave to file our 13th omnibus objection. Our objections are set out in detail in the 13th omnibus which is docket number 93-11.

THE COURT: We covered this yesterday. Tell me what the issue is today.

MR. DIERKES: Right. Well the specific issue is we still have 20 claims where we contend that there's no authority. Mr. Speights contends there is authority. There is a court order entered back on September 23rd of 2005 which required Mr. Speights to identify the claims for which he believes he has authority and proof that he has authority and it's four months later and he still hasn't given us that proof.

THE COURT: All right. What are you looking for that he hasn't produced?

MR. DIERKES: We're looking for solid evidence that he was actually authorized to file these specific claims. He hasn't given that to us.

THE COURT: All right. What does solid evidence mean?

MR. DIERKES: Something signed by the claimant that says that they authorize Mr. Speights to file the claim and when they authorized him to file the claim.

THE COURT: All right. Mr. Speights?

MR. SPEIGHTS: Maybe the short answer would be we could agree on a two-sentence form and I could send it to these remaining ones and get it signed and maybe that's -- if that would expedite it and that would be agreeable I'll do it. But I have an explanation. And let me just give you one example. It's the first one on their list. It may not be the best, but it's certainly not the worst example of what we have here. The first one is the Hyatt in San Francisco. I personally can talk about it because I personally dealt with the Hyatts before the bar date and I dealt with a lawyer representing the Hyatts in-house named Stephanie Fields I believe in the great city of Chicago. And I have a series of e-mails with Ms. Fields saying do you have this, do you have that signed, give us this information, I need that information, all of which are

attorney-client privilege. Clearly I had authority from Ms. Fields. She told me I had authority. I know I had authority. There was not a contract signed, retainer agreement signed for Grace at that time before the bar date, but I was operating with her express authority, express permission and with a lot of exchange of information and I'd be happy to share these e-mails with the Court if I don't waive attorney-client privilege. It can be done in-camera.

THE COURT: Do you want me -- a retainer agreement?

MR. SPEIGHTS: No, Your Honor. I don't believe so. I mean that's --

THE COURT: There's nothing under state law that says that you have to have a retainer agreement.

MR. SPEIGHTS: I don't believe so. However I tell you that, for example, I've represented the Hampton Schools, my hometown is 3,000 people, for years without a retainer agreement. It's certainly customary. And in fairness, may I say a couple of things about these e-mails without their being deemed a waiver of the privilege?

THE COURT: Yes, I guess, so that I can understand what the issue is. I mean it seems to me that maybe I'm just unfamiliar with a state court practice that doesn't require a written retainer agreement. But I don't know how you represent somebody without a written retainer agreement.

MR. SPEIGHTS: I can explain that if I can refer to

the e-mails without waiving the privilege.

MS. BROWDY: Actually, Your Honor, I have no problem with that at this point, but let me -- if we're going to talk about privilege, we've asserted he didn't have authority to file the claims. He gave us information that doesn't assert -- the data he gave us doesn't show that he had authority to file the claims. He's now saying I have it in confidential attorney-client communications. You can not use privilege as a sword and a shield saying I had authority from these clients but I'm not going to disclose to you how I got it. So if he puts at issue these attorney-client communications, he has to waive privilege because -- and I have a line of cases. It didn't occur to me to bring them here today.

THE COURT: Well I understand that line of cases. It seems to me, however, the issue is this. If you have the authority and the only issue is the ministerial act of getting somebody to put it in writing, then I'm going to give him time to do it, although I don't know why, Mr. Speights, we're here today without your having done that. I really don't understand that. You know what the objections are. You know, this has been going on for a long time and it seems to me that if the authority's there, it's not that hard to call your client and say look, I need you to sign a two sentence letter that says I have the authority to do it.

MR. SPEIGHTS: I appreciate that, Your Honor, and --

MS. BROWDY: And Your Honor, and both the authority and when authority was given because of the issues raised yesterday.

THE COURT: Well I understand.

MR. SPEIGHTS: And that's fine and I should -- I've been doing this too long to say anything else now that I accept the Court's ruling. But I think we've gotten down to just a few and we all have our bureaucracies. I've been trying, but I realize now with the voice of the Court saying it's now or never to put this in writing what these e-mails reflect, I think I'll get it done.

THE COURT: Well it was now or never at the bar date.

MR. SPEIGHTS: Well --

THE COURT: So if there are any other cases coming up in which there's a bar date, this latitude isn't going to happen in those other cases. Let me just explain that. I understand that, you know, there's a learning curve in dealing with lawyers and judges back and forth. But my learning curve is if I put a date on record, I expect it to be honored unless the parties come forward with evidence before that date and tell me why they need an extension. I'm pretty liberal about extensions for the most part until it gets to a point where I think it's abusive and then I'm not. So it's just the way I'm --

MR. SPEIGHTS: Thank you.

THE COURT: -- accustomed to practicing that way in this District and the Western District of Pennsylvania. That's generally how people behave here. That's the way I generally behave. But I don't expect to have something come up in Court at the last minute when you've had two years to get it done and I'm not going to be liberal about it in the future.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: All right. I'll give you two weeks to get these documents signed and show when you got the authority, who gave it to you and the method by which it was communicated.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: What else do you need, Ms. Browdy?

MS. BROWDY: I think that would do it on these 20 unauthorized claims.

THE COURT: All right.

MS. BROWDY: On the product I.D. --

THE COURT: Wait. I need to catch up with my notes. Just a minute, please.

(Pause)

THE COURT: Okay, Ms. Browdy. Thank you.

MS. BROWDY: Thank you, Your Honor. On the product I.D. I believe we've resolved everything except for Coca-Cola Enterprises. The Court was going to tell us I think today whether or not --

THE COURT: Oh, and I forgot. I'm so sorry. I

totally forgot to look last night when I got home.

MS. BROWDY: We understand the Court has a lot on Your Honor's plate. We are going to be before the Court again Monday for the omnibus hearing.

THE COURT: Okay. Yes. What I will do, if we have a recess, I will make a phone call to my husband. If I can get him at work, then it shouldn't be an issue. I ought to be able to be able to tell you that today. I just simply totally forgot. I'm so sorry.

MS. BROWDY: No, that's fine, Your Honor.

THE COURT: Okay. So let's move to this -- on to something else and I'll get back to this one later.

(Pause)

MS. BROWDY: The last item then that we have up this morning, Your Honor, before moving to class certification is the follow up on what Speights is going to be obligated to do to get true responses from his clients as to their date of knowledge. You'll recall we dealt with that at some length yesterday. I've given out proposal to Mr. Speights. I'll hand up a copy to the Court.

THE COURT: All right.

MS. BROWDY: Again, all of the other claimants in this bankruptcy by order of this Court after extensive briefing and hearings on what ought to be in the proof of claim form, everyone was responsible for answering questions 18 and 20

which reflected date of knowledge of presence of asbestos in the property and specifically date of knowledge of Grace product. Mr. Speights put in false information for his clients, indicated 2003, without ever asking the clients. And what we would now ask is that Mr. Speights be ordered to go back to each of the clients for whom he still has a live claim, then it's about 500 claims -- fewer clients because, for example, California State may be, you know, 50 claims or so.

But for each claimant we need to know when the claimant first learned of the presence of asbestos in the property for which the claim is being asserted. Second, when did the claimant first learn that the property for which the claim is being asserted contained a Grace asbestos containing product. And finally consistent with what the intention of the claim form was, we want that statement signed under oath not by Mr. Speights, but by a corporate representative that has authority to bind the claim that he's making the claim. Again, we think it's fully consistent with what the claim form required everyone else to do by March of 2003. We can't do anything with the 2003 date that Speights gave us. We need this information to go ahead with our objections process.

THE COURT: Okay. Well you're not asking for anything other than what the claim form asks for.

MS. BROWDY: Yes, Your Honor.

THE COURT: Okay. Mr. Speights.

MR. SPEIGHTS: Your Honor, I thought we'd heard this matter yesterday and you had ruled. I didn't even bring the file back with me today. And I thought your ruling which I completely understood was that Grace had a choice and they wanted to think overnight, they either -- you would either require me to send the claim form to my clients and make them sign it, the appropriate person, or they could send an interrogatory, one or the other.

THE COURT: Right.

MR. SPEIGHTS: And if that's the issue, then I don't -- this is something a Court order, you directing me to do some special questions, et cetera. I think this is -- I think Ms. Browdy had a choice of A or B and she came back with C.

THE COURT: Well, no, I believe that this is the same information that's already on the claim form. It's stated differently in this exhibit that she's handed up. But I think she handed up an exhibit a little earlier that is the claim form that had questions 18 and 20 which asks for the dates when the claimant knew about asbestos in the property first and then asked about the date that they knew of Grace's product in the property second. And that's the same thing that this form is asking for.

MR. SPEIGHTS: Well, Your Honor, I respectfully disagree although I will need first to admit that reasonable people can disagree on the interpretation of the claim form

because I and other people have read the first question. The only one they've objected to is the answer to question 18 and I don't have the file with me with the claim form in front of me.

THE COURT: Could you put the claim form back up, Ms. Browdy, please?

MS. BROWDY: Certainly, Your Honor.

THE COURT: Okay. Question 18 is when did you first know of the presence of asbestos in the property of the Grace products --

MR. SPEIGHTS: Yes.

THE COURT: -- in which you are making this claim? And then the second one is when did you first know that the Grace product for which you are making this claim contained asbestos? So I think it should be when did you know of the presence of asbestos in the property, yeah, of the Grace product for which you are making the claim? So the first question is still asking about in the property of the Grace product -- it's still asking for Grace -- the Grace product date not just general knowledge of asbestos in the property. And the second question, which is question 20, is when did you know that that product had asbestos? So the first one just wants to know when did you know -- well they're asking the same question. They're both asking the same thing.

MS. BROWDY: Wait --

MR. SPEIGHTS: I think it is. And it's -- we can

spend a lot of time arguing about what they mean. I think it's ambiguous. I think she wants to -- she wants to clear up the ambiguity.

THE COURT: Well I mean I don't think it's ambiguous. I think they're both asking for the same thing.

MR. SPEIGHTS: I think --

THE COURT: The first question should have asked when did you know about asbestos but it doesn't ask that. It asks for Grace products. They both --

MR. SPEIGHTS: And I think that's why our answer at the time was made in good faith and was correct, and they don't like it because they asked the same question twice.

THE COURT: They did ask the same question twice, Ms. Browdy.

MS. BROWDY: Your Honor, there's -- there can be no -- you can't argue with the straight face that the 2003 date was given in good faith. The 2003 date was given for properties that didn't have Grace product in it, that were withdrawn because they lacked product identification.

THE COURT: Regardless, you've asked the same question and you got an answer. You may not like that answer. You can take depositions of the claimants. I'm sympathetic to your assertion that the claim form should be signed by the claimant under these circumstances and I'm going to have Mr. Speights return it to the clients and get them to sign it. And

if they don't agree that 2003 is the right date, then I'll order them to amend it. I don't want a false proof of claim form filed. But if in fact that's the date in which they knew that Grace products were in the property and that's the asbestos containing product, then that's the information and whether you like it or not, that's what they're going to tell you.

MS. BROWDY: Okay. So he's going to get ordered to go back to each of his clients and answer questions 18 and 20 on the claim for by a client signed under oath.

THE COURT: The one that -- the ones that you've objected to that are still at issue, yes. I'm not going to have them go back -- their clients, yes.

MS. BROWDY: Okay. And again, everyone else in this bankruptcy had to do that by March of 2003. It's two years later. I mean I think he should have to do that within --

THE COURT: He had the authority to sign the claim form. Assuming he had the authority then you've got a proper claim form. Just because you don't like the information doesn't mean that it's false.

MS. BROWDY: But it's -- again, it's -- we don't like it because it's false. It's --

THE COURT: You're making a giant leap, Ms. Browdy, which I really would appreciate your not doing. An assertion that an attorney is falsely presenting information is not

something this Court takes lightly. And if in fact you prove that, there's going to be a reference to the Department of Justice for criminal prosecution as a result. So, please, do not use those words in this Court lightly.

MS. BROWDY: Your Honor, those words are not offered lightly. That was spelled out factually in our objection, the 13th omnibus, claim 9311 that has evidentiary record. It has affidavits attached. It has letters attached.

THE COURT: We're talking, Ms. Browdy, don't expand the subject, about the claims that are at issue right now where I'm going to order Mr. Speights to take these back to his clients and get them to sign under oath the answers to the -- pardon me, to the questions on the proof of claim form. That's what's going to happen. They're going to answer it. If the answer comes back 2003 just because you don't like that answer doesn't mean it's false.

MS. BROWDY: Fair enough, from the client. We need the answer from the client.

THE COURT: From the client. Yes. Mr. Speights, how much time do you need?

MR. SPEIGHTS: Well I don't know what the short answer is, but more than a short amount of time. I mean I need -- I don't need but a week to go out to clients, but -- I'm cognizant of the fact that a large of number of these are California buildings and these people are going to answer the

question based on the best of their knowledge. We have been supplying them, by the way, documents along which in some instances clarifies the situation. But are you telling -- I hate to even ask this question. If the answer is to give you the best good faith answer they can, 30 days. If you're telling them to question everybody who's ever worked in the building, look at every piece of paper both at that institution and within the state hierarchy of the State of California, et cetera, et cetera, I don't know how long it would take. It may be an initial answer and a supplementation.

THE COURT: They've had since 2003 when the claim forms came down. So hopefully they've got this process underway. If they intend a proof of claim, then they know that they've got a burden of proof and that is going to be part of their burden of proof when it's objected to. So I don't expect it's going to take another six months to contact everybody in the state if that's what's required. If you need more than a month, okay. But it's not going to be a six-month long process. They've had plenty of time to get this together.

MR. SPEIGHTS: I understand it, Your Honor.

THE COURT: You want 60 days, I'll give you 60 days. But I expect at the end of that time if the claim form is not signed by an authorized representative and they have to undertake whatever investigation is appropriate for either the state or the corporation, whatever it is, to get that

information, you know, back. There are state laws that govern when a corporation is alleged to have knowledge of its employees and sometimes when it isn't alleged to have that knowledge. So --

MR. SPEIGHTS: Let me say, just so the record is clear and people on the phone as well. We have continued to gather documents and get information and the 2003 is the date we identified, our clients identified Grace is consistently the right date. Will we find a situation where on further investigation we don't find some document else way, I'm confident that will probably happen. But I don't think you're going to see any wholesale change of the 2003 date as you and I interpret the question. Thank you, Your Honor.

THE COURT: Okay. The proofs -- the signed proof of claim forms are to be submitted to the claims agent with copies to Ms. Browdy, I want copies sent to her so that she knows that in fact this information has been appropriately filed by -- when's the April omnibus?

MS. BROWDY: April 17th, Your Honor.

THE COURT: Okay. If I have them filed two months from now, March 24th, that should be sufficient time to put these back on the April agenda if there are still any other issues left and for you to work out the terms of an order if in fact this satisfies whatever objection the debtor has at that point to this issue.

MS. BROWDY: Thank you, Your Honor. That would bring us to the Anderson motion for class certification.

MR. BAENA: Your Honor.

THE COURT: Yes, sir.

MR. BAENA: May I say something before you move onto the next subject.

THE COURT: Yes.

MR. BAENA: Judge, I only rise because of the implication of something you said in respect of the estimation which we are principally responsible for. A moment ago you alluded to the burden of proof that claimants have in respect of when contamination -- when contamination occurred.

THE COURT: No, that wasn't the question. The question is when did they know that there was a Grace product that had asbestos in the building?

MR. BAENA: You referred to it as their burden of proof. And respectfully, Judge, I reserve the right to disagree with that interpretation of the law at another time because that's not our view.

THE COURT: The claimant doesn't have to prove when they had a claim accrue?

MR. BAENA: No. The claimant has to prove that they have a claim.

THE COURT: Right.

MR. BAENA: They have -- in many states, most states,

the fact of contamination is what triggers the accrual of the claim. A claimant doesn't have to prove though when that occurred in those states. If the defendant wishes to assert by way of affirmative defense that the claim is time barred because the claim accrued and the time ran under the statute to bring that claim, it's the defendant's burden of proof in those jurisdictions, especially in California under the Samsung decision. It's the defendant's burden of proof to show when the release occurred. And so --

MS. BROWDY: Your Honor --

MR. BAENA: And so I'm not here to argue about it, Judge. I just want to sort of put like an asterisk next to your comment to reserve our right to suggest otherwise in other contexts.

THE COURT: Well that's fine except that I don't think I was going where you've just gone. My comment wasn't intended to go where you just went. So to the extent that it was interpreted that way, that was not the information.

MR. BAENA: Okay.

THE COURT: I'm talking about a proof of claim form that has a question on it that I've ordered people to answer. It's their burden to fill out that proof of claim form and assert the proper and truthful information on that claim form. The debtor can't fill out the claim form for the clients. The clients have to fill it out. That's their burden. That's what

I was attempting to say.

MR. BAENA: Okay. Yeah, I apologize, Judge. I thought I heard you say burden of proof.

THE COURT: Well I probably did. I apologize because sometimes I say burden of proof and I mean burden. To the extent that I said burden of proof, I retract the "of proof".

MR. BAENA: Thank you, Judge.

THE COURT: All right. Thanks. Ms. Browdy?

MS. BROWDY: And again, Your Honor, that takes us to the Anderson motion for class certification.

THE COURT: All right.

(Pause)

THE COURT: Mr. Speights?

MR. SPEIGHTS: I'm sorry, Your Honor. I'd like to say it's because I'm still under the weather, but I was thinking through a situation and thought that counsel might be going first and I realize it's my motion, albeit there's some branches of the tree out there that have to be dealt with in addition to the main part of the tree.

Your Honor, we are here on Anderson's motion to certify and I want to give you a little bit of background, less than three minutes, and then go to where I think we need to go today and where I understood you wanted us to go today as a threshold matter before getting to the merits or the few merits of this motion. And I say that because at the last hearing and

at this hearing I continue to be of the view that evidence needs to be presented, especially in light of the assertions made by the debtors in their various briefs and that we cannot agree to any assertion of factual on that as made by the debtors because we sharply disagree with many of their assertions and because we think there is evidence available to us that will greatly buttress our motion for class certification.

But let me stand back just a minute. I really was thinking last night about what we've been doing the last few months and I realize that I thought I had retired from this and I thought I had retired from this in 1992. And this is not a long war story, but it's a quick story to illustrate the importance of the class. In 1986, 20 years ago this week, I tried the Greenville City Hall case and got the first verdict in the country against Grace in any kind of asbestos case, personal injury or property damage, and it was the first asbestos property damage case tried to a successful verdict in the country. And from '86 until '92 I settled with W. R. Grace claims on behalf of in excess of 200 buildings in approximately 30 states.

In 1992 I tried to semi-retire. I'd had enough of this frankly going across the country and litigating case-by-case-by-case. And so I came back from a 12-week trial in North Dakota and filed the Anderson Memorial Hospital case as a class

action. And I did so for several reasons, personal reasons being one of them, I did so because frankly nobody can try hundreds of these cases and certainly not in our law firm. We have four lawyers. I'm not some mega firm that starts trials in 10 states at a time. And frankly because by then I thought the litigation was pretty clear with an additional certification of the colleges class that the courts had recognized in asbestos property damage cases that they are particularly good for treatment by class action, Rule 23, which would regard the multiplicity of lawsuits. That's the purpose of the class action, to efficiently deal with it.

And so I thought I had gotten out of what we've been doing here since July of dealing with hundreds of claims because if Grace had not declared bankruptcy, one of those what if games, I would have either tried or settled or had dismissed, won at trial, lost at trial, a case brought on behalf of Anderson for the entire class. I would have tried one claim. It would have been Anderson's. If it would have been a national class action it would have been Anderson; if it was a state certified class action it would have been Anderson. It would have been the Anderson claim as a representative of a class. Whether the statute of limitations had run or not would be a question of whether Anderson's statute of limitation had run. Whether there was liability for Grace and negligence or nuisance or strict liability of what would have been tried with

respect to Grace's product in Anderson. Whether there was a conspiracy or not would have been tried with respect to what evidence Anderson produced. In that case in the case of South Carolina would have been tried in South Carolina.

So I've listened now for months about Speights filing all these claims. The fact of the matter is I was trying to file a class. I did file it. Part of it was certified to create a pot of money. If we'd have won by settlement or by verdict, a pot of money would have been created, liability would have been created like other class actions, other class actions that, you know, that are handled in my state and others and there would have been a claims facility and people would have made claims against the facility and we wouldn't be trying 500 cases. We'd be having a claims facility. And that was the purpose of it.

We weren't -- when we filed later claims in this case, it wasn't that we were trying to, quote, gain the system, it was to try to protect, as I've said repeatedly, upon the advice of an ethics professor, protect the class for whom I filed the case.

Interestingly from '92 until 2000, not only did class actions proceed in asbestos and not only were class actions concluded such as the colleges class against Grace also filed in South Carolina, but in essence we did the same thing in other bankruptcies. Class claims were permitted, for example,

in the Celetex and National Gypsum bankruptcies. In Celetex a facility was set up, class claims were put forward made by the class representative. Nobody tried a case on behalf of hundreds of colleges in America. There was PE trust that was a facility and people either win or lose before the facility. I think the authority person who deals with claims in Celetex is roughly 50 percent, 50 percent of claims allowed, 50 percent are disallowed. Excuse me a moment, Your Honor.

(Pause)

MR. SPEIGHTS: But that's what we started and that's what we intended and now we are -- and I'm not here complaining about the process. I understand what's happened now because we have a bankruptcy and we're down the objection road rather than the trust road which I plea for constantly.

Your Honor, the other thing that I've said is that I wish the Court would be mindful of the effort that was made on behalf of Anderson from a period of 1992 to 2000. When we get to the point of making a factual record, which I do not believe is today. Your Honor said recently you wanted to start with legal issues. But I believe that we will show that we not only spent, you know, eight years of work, numerous motions. We conducted discovery throughout this country against Grace. The most discovery I've ever done against a defendant in any case I've ever handled was done against Grace in the Anderson class action case. I spent probably close to a million dollars in

expenses, that's not the hundreds and hundreds of hours, all to protect the class.

Now of course Grace filed bankruptcy and has filed -- we filed our brief. I'm not going to deal with the timeliness issue now because I don't think that's what before you again on the merits other than to say I think we filed our motion to certify as soon as we could under the Charter case. I do think in Grace's brief on the merits, however, they properly identified the issues ultimately for you to decide in whether to certify a Rule 23 class. They say, Grace says to warrant a class certification the Court must determine whether a class action makes sense and will advance the interests of the bankruptcy and second, even if claimants can demonstrate that a class must be acceptable, the claimants must also satisfy the elements of Rule 23 and in particularly they talk it being a superior method.

And I think that at least for purposes of today's argument we can at least start with that framework. And right away everybody has focused on the first element of that. Indeed some of the cases suggest that that is the primary focus, will this assist the bankruptcy. And we've got several arguments on that, Your Honor, but what was presented to Your Honor in our initial motion was that it would greatly assist the bankruptcy. It was assist the estate in making sure that they are not claims out here that still can be made and it

would assist of course property damage claimants who may not have gotten notice. It would greatly assist the bankruptcy because we believe, we asserted we think we have shown at least from a prima facie standpoint and certainly we'd be prepared to do so that despite all the work and all the effort that went into the bar date order which I appreciate and I'm not here today to criticize the bar date order, I'm here to criticize W. R. Grace for not providing certain information and for not doing certain things. But despite everything the Court did and despite the 4 million dollars or whatever that was spent on there, there's a gap there. There is a gap because Grace did not notify people that it had knowledge of that had its asbestos containing products in their buildings.

The law -- I've read -- as you know we've been briefing this week while I've been -- I'm going through the best I could in my condition trying to get ready for the objections as well. But to the extent that I've been able to concentrate on the law, I don't think we're that far apart on the law. The cases clearly suggest that if you can give actual notice it's preferred, actual notice to constructive notice. So that in addition to the construction notice program which Your Honor approved, the actual notice should be given to those and Grace says to those people who are reasonably ascertainable from their own records.

Well again we get to the final argument on this. I

may question some semi-colons and about some of their standards, but I'll live with that standard for today for the purpose of my saying we need to develop that record. Because, Your Honor, I think Grace simply saying that they did certain things or had no records, or Grace simply saying that we gave notices in their brief to 200,000 claimants suggesting they gave all this actual notice, number one saying it's so doesn't make it so and number two, I don't believe it is so. I do not believe that Grace gave actual notice to a large number of claimants where it had records that Grace's product went in their buildings.

And I assert the minute they took this position, I don't say the minute, within a short time after they took their position in response to our brief, I served discovery on Grace. I served it on several issues, but this is the issue Your Honor focused on at the last hearing concerning I want to question a 30(b)(6) the person who knows all about that. I've seen invoices. I have copies with me. If Your Honor wants to see them which have specific street addresses on them, specific post office boxes on them, where their product was shipped to specific buildings. I have seen advertisements of Grace, internal documents -- by the way both the invoices and these were supplied to me by Grace over the years in Anderson discovery and in other cases. They're Grace's documents. I have seen other data compilations by Grace salesmen back during

the time that identify where material was shipped including identifying salesmen and sales houses were material was shipped. And that alone to me suggest at least we ought to have a factual record of what they did with respect to these.

In addition, I'm going to have to be convinced by solid testimony that Grace does not have a data bank which contains a lot of this info. I think Grace was first sued, if I'm not mistaken, by Mr. Dies in 1982 in the Evendale case. And it was involved in a number of property damage cases from 1982 until the bankruptcy including a number of class actions. It obviously wants to know when somebody brings a personal injury lawsuit against them and says I have mesothelioma and I remember working in the First National Bank building in Little Rock, Arkansas. Well it just seems self evident to me in managing a major company and managing the asbestos liabilities that somebody within the W. R. Grace framework would be able to look up on a spreadsheet or something and say was monocoat used in the First National Bank building in Little Rock, Arkansas, else we've got a defense here and there was no exposure to Grace's product.

So the combination of the PD litigation and the personal injury litigation which came a little later than '82 I think, that that combination leads me to believe that they have a lot of information about where their product went. And if they had that information, the question is, did they do

something to give actual notice to these people and if not, why not. Well we've got to have testimony on that. We've got to know, you know, what would have been required.

I do know this. This is the smallest of all examples I could give to you and I just thought about it and I had somebody send it to me electronically today. I have in my hands and invoice for Buyers Machine Company, Post Office Box 464 in Lauren, South Carolina, 30 bags of monocoat, March 23, 1973, after the announcement that the product was going to be banned but within the 90-day period before it was actually banned or the spray application was banned. Now Buyers is one of those claims which you struck subject to their being a class action protecting them. It's a South Carolina building. I had not contact with Buyers before the bankruptcy or until midway during this war with Kirkland and Ellis. I believe honestly that I had authority to file a claim on behalf of Buyers because the judge in South Carolina said I was the class representative, certified class on behalf of South Carolina building owners.

Now to my knowledge W. R. Grace did not give notice to Buyers. If it did, it'll make me wrong and I'll be embarrassed and I'll ask them about 3,000 more. But I do know this. I do know that Buyers is readily ascertainable because when Kirkland and Ellis decided to proceed against Speights and Runyon in June of last year, they served Buyers with a subpoena

to question their form, to question the authority. They knew exactly how to find them. They had not problem whatsoever in serving Buyers with a subpoena. I spoke with the lawyer who represents Buyers. I didn't know him beforehand but he and I we went to the same school.

THE COURT: Well there was a claim filed.

MR. SPEIGHTS: Pardon me?

THE COURT: I mean there's a -- they contacted Buyers after the claim was filed to find out whether there was authority to file the claim and the proof of claim has the address on it.

MR. SPEIGHTS: The proof of claim had the same address.

THE COURT: Right, that's what I mean. They got it from the proof of claim.

MR. SPEIGHTS: Right. But my point, Your Honor, is this is their document. This is -- the proof of claim attached a Grace document, the invoice with the address. And the question is whether there was --

THE COURT: But this is an address from 1983. Number one, the building may not be there. Number two, the owner may not be the same. The building itself is clearly not a claimant. Now Buyers Machine Company may be. But the fact that the debtor has a record that's 23 years old doesn't mean, I think, that the person who owned the building 23 years ago is

still a creditor in the case. That's the whole purpose of constructive notice and a widespread dissemination of constructive notice so that current claimants that the debtor doesn't know about get notice and can come forward.

MR. SPEIGHTS: But Your Honor, my point is this. I don't suggest to you that if they sent a notice to everyone of these people where they have the names and addresses that every one of them will get the notice. What I suggest to you they've got a large number, and I haven't moved beyond invoices yet, they have a large number of addresses where material is that they never attempted to give notice to. It would not have done -- it would have cost them 32 cents --

THE COURT: Material in 1983 --

MR. SPEIGHTS: Pardon me, Your Honor.

THE COURT: Where material was in 1983, not where it is. I mean how would that -- how would the debtor know whether -- even if it -- let me just do a hypothetical. Let me assume for the moment that the debtor knew that there was in 1983 asbestos not just delivered to but installed in that building. Okay. There's no way that the debtor would know currently whether that asbestos -- whether the building is still there, who owns it, whether the asbestos was ever put into the building at all or whether it's still there. That's -- that's the whole purpose of a constructive notice program.

MR. SPEIGHTS: Your Honor, I believe the constructive

notice is to -- is to do the best we can where we don't -- where we can't give actual notice.

THE COURT: Well I agree with that. But I'm not sure that you can give actual notice to a current building owner just because you knew that a certain set of facts existed 23 years ago.

MR. SPEIGHTS: What you're saying, Your Honor, is without any discovery yet about what all was available to it. My point is we need a factual record because I believe we will show that Grace has -- I started out with the easiest example, an invoice, Grace has information within its records about where its product was placed. It's got -- it's got material -- it's got photographs where the material was applied in its depository. It's got advertisements where its product was applied. It's got correspondence with building owners about what to do about the product in its buildings. It's got certainly information from the BI litigation about where people were exposed and when and may well have that somehow reduced to some data format which is quickly available.

I think we owe it for the purposes of fair consideration of this issue to have a factual record to see what is there and what isn't there so that at the end of the day Your Honor may say, well I don't think the invoice is enough but I think that might be enough, et cetera, et cetera. Otherwise you're saying even if Grace -- theoretically even if

Grace knows that two blocks from its headquarters in Columbia there's monocoat in that building and it walks through that building to go to meetings. It knows it as certain as anything in life. Okay. It has no obligation to give actual notice to that building owner. And I just don't think that complies with any of the cases, theirs or ours, that we've cited to it.

At some point Grace has an obligation to inform people of its right to file a claim in this bankruptcy where it knows its product is there and they have a claim. And you might disagree with where that point is, but if it's any point I'm entitled to discovery to develop the factual record.

THE COURT: I think that even if there is constructive notice to the filing of a bankruptcy, the law in this Circuit is very clear, that that puts the burden on the claimant to file a proof of claim. So whether Grace gave them actual notice of the proof of claim form or not, the issue is did the claimant know that there was reason to know that Grace had a bankruptcy and to file a claim. So I really don't think this issue's going to go too far because that trial of that issue, the actual notice versus constructive notice really is based on whether or not the building owner knew that Grace was in bankruptcy and therefore had an obligation to file a claim whether Grace gave it actual notice or not.

MR. SPEIGHTS: And I understand that, Your Honor. But I think Your Honor would agree not all of the people with

Grace's product got actual notice of the bar date.

THE COURT: I don't know who has Grace's product or if any building has Grace's product in it.

MR. SPEIGHTS: So the best --

THE COURT: I don't know that --

MR. SPEIGHTS: But the best constructive notice devised by human kind has never gotten it disseminated to every single person who would be affected.

THE COURT: Of course not, neither has actual notice as far as I know.

MR. SPEIGHTS: Right. So there is a gap here. I happen to think it's a large gap. I think that, for instance, you talk to Buyers, I personally live in South Carolina and personally interested in this subject and I personally do not recall reading anything about the bar notice in South Carolina. Obviously I knew about it because I'm actively involved in this case and I filed a number of claims and everything else. I don't know -- and I'm not being critical, I'm not sure what South Carolina newspapers carried a Wall Street --

THE COURT: Well look, with respect to the notice program, that was vetted ad nauseam in this Court before an order was finally signed. The order that was originally signed required some additional information to come in from counsel whose claim holders would be filing claims. At the request of the Committee and with notice to not just the Committee members

but everybody else, I entered an order that said that counsel of record for those claimants did not have to produce information as to whether they had personally served their own clients with that information.

Now you're saying in this instance that you just gave me that you hadn't talked to Buyers before the proof of claim bar date. So I don't know whether Buyers had counsel of record or didn't have counsel of record. And at the request of the Committee with knowledge of the Committee members and everybody else because the service list is quite extensive on this order which was not appealed that counsel for those claimants have prevented the debtor from knowing whether there was actual notice served by attorneys who were ordered to make that service or not. Now you can't have it both ways, Mr. Speights.

MR. SPEIGHTS: Your Honor, respectfully, I think it's Grace trying to have it both ways. Your Honor has ruled that I had no authority to file these claims.

THE COURT: Some of the claims, that's right.

MR. SPEIGHTS: Right. And that's the group I'm talking about such as Buyers.

THE COURT: Well --

MR. SPEIGHTS: Grace had said, made the motion, you agreed I had no authority to file them, that I don't represent them.

THE COURT: All right.

MR. SPEIGHTS: So there's this large group that in this case it's been determined I couldn't file individual claims for.

THE COURT: But their claims were stricken. They didn't appeal. They didn't ask for reconsideration. They didn't have an attorney file a claim. They have all sorts of legal options available to them and they definitely got notice of the fact that an order went out that said that their claims are disallowed or stricken, whatever the -- or modified, whatever the appropriate order was, you know, given the particular facts in the case. They're not here.

MR. SPEIGHTS: Your Honor, I'm here because I filed the class action in 1992 and I'm here trying to convince Your Honor, and I realize that you're skeptical of my position to put it politely, I'm trying to convince Your Honor that Grace had some duty to give actual notice to some people.

THE COURT: I don't disagree with that.

MR. SPEIGHTS: And then the question is, can we just simply develop the facts of who they gave actual notice to, who they could have given actual notice to and who they did not give actual notice to.

THE COURT: Well I believe there is an affidavit of record that was filed by the noticing agent as to who was served. Now that's my recollection and again I apologize if I have this case confused with the others. But Ms. Browdy?

MS. BROWDY: I would have to chase that down. If my partner, Ms. Baer, is still on the line she might be able to address it. I think Mr. Speights' entire argument is wrong as a matter of law. But --

THE COURT: Well I'm not going there, Ms. Browdy.

MS. BROWDY: Okay.

THE COURT: You'll have a chance. All I want to know is the simple thing, is there an affidavit of record with respect to who was given actual notice by the noticing agent?

MS. BROWDY: And again I'd ask Ms. Baer.

MS. BAER: Your Honor, Janet Baer on behalf of the debtor. Yes, there is a certification of counsel in the record done by BMC who was our notice agent. It is, I believe, several hundred pages long.

THE COURT: So there is an affidavit -- thank you, Ms. Baer -- as to who was actually served.

MR. SPEIGHTS: And that's one of three things I said and I appreciate that and I would appreciate Ms. Baer sending me a copy of that and --

THE COURT: It's on the record. You can print it off of the CMECF system.

MR. SPEIGHTS: I understand it. But -- and again I think it's an issue of fact and I think that's a factual thing that we'll need -- excuse me -- be made part of the record by Grace.

THE COURT: It is part of the record. It's filed of record.

MR. SPEIGHTS: Well Your Honor, I'm not -- I need to go down this path, but I'm not sure that it's part of the record on the motion now that anything that's ever happened in the bankruptcy is part of the factual record for the motion being argued before you.

THE COURT: Well I can certainly take judicial notice of the fact that the certification is of record and it says what it says. If you want to put at issue that a particular person or entity on that service list wasn't served, you may do so. But otherwise there's a certification that indicates that they were served and as far as I'm concerned that's filed by counsel of record. I don't have any more reason to assume that it's false then I have reason to assume that you're filing false things, Mr. Speights.

MR. SPEIGHTS: And I'm not suggesting in the least. I'm just suggesting, Your Honor, that given that that's part of the record all I was saying is now my next question is, we have a record of what Grace has filed of who they served. Good. That's one of the things I said I wanted. We now have it. I'm not challenging counsel's credibility or integrity. I don't go there.

But my next question is, who could they have served that they didn't? What records did they have available, what

data did they have available, how easily could they have served other people with Grace's product? And that's the missing ingredient from this factual record. When we get that, you may say to me, Mr. Speights, I've looked at that, I think Grace's constructive notice is sufficient. They didn't have to write Buyers and they didn't have to write Jones Bank and they didn't have to do this and that. But I'm dealing now with a vacuum. I don't know what all they have. I've just got a great deal of suspicions and I want my facts so I can build my record. And Your Honor can agree or disagree with it, but this is a contested proceeding and I want to be able to show that.

THE COURT: But this proceeding is asking for class certification. If you're correct on the class certification motion, the class is going to get notice of the class certification. So what difference does it make? And if you're wrong on the class certification issues or I don't mean wrong, but if I decide not to certify a class, then in that sense the people who have had notice have the right to come in and file a claim based on the bar date. Those who say that they didn't get notice but find out about the bankruptcy later have an excusable neglect standard that they have to show under the Pioneer line of cases. The normal processes for filing proofs of claim apply. So I don't know where we're going with all this. Why am I going to have an evidentiary hearing to do -- to do something that seems to me to be -- well I'm not clear

what the point is.

MR. SPEIGHTS: Your Honor, we may or may not need an evidentiary hearing in the broad sense of calling people. But I do believe we need evidence. If you'll just take, Your Honor -- the best case they could find which is the Sacred Heart case, of all the cases in the world this is the best they could find. It's actually helpful to me in a number of ways especially it says that the South Carolina class should be recognized. But leaving that aside, this case and all the other cases suggest that one of the considerations is, "While we agree with movants that a class be proclaimed as an appropriate device in certain circumstances, we find that such circumstances are narrowly defined," and it goes on to say one of the issues is, why they would not certify here is, "There is no evidence that the debtor excluded or failed to provide proper notice to the putative class members." That's one of the issues. Did the debtor provide proper notice to the putative class members?

And I believe in deciding the certification issue under their first prong which says will it assist the bankruptcy that we need to find did they properly serve putative class members and not challenging the constructive notice program but challenging what they did not do which I say they should have done once I get the information from them. I'm not seeking 50 depositions or 10 tons of documents. I'm

seeking a 30(b)(6) deposition and documents in connection with who they could have given notice to, actual notice to, about their asbestos containing products being in buildings. And if I can come back before you in 30 days and say we now have the deposition of somebody, Mr. X, who says here's this readout and they could have for the cost of a stamp per building owner given actual notice to these people, I'm going to strongly argue that they should have done that. You might disagree, but at least that's the offer that I want to mk.

THE COURT: Okay. I understand what you want to do. I'm not sure it's going to be helpful, but I'll consider it in light of the rest of the arguments. So what else would you like me to focus on today?

MR. SPEIGHTS: Well, Your Honor, my understanding is that that was going to be the focus today, that's what you wanted to T up as a threshold matter as to whether -- what our basis was in going forward with discovery. Now before we also argue the merits of the motion, there are a couple of things that we have pending. First of all, they have attacked the South Carolina certification on the grounds that somehow it was a put-up job down South Carolina. I believe under the Sacred Heart case which says it may well be res judicata and if this class is certified beforehand you should normally recognize it plus your other comments about the South Carolina case. I would like to think that we could just accept the finding of

the South Carolina Court and be done with it. However --

THE COURT: The class -- I'm sorry. Would you just refresh my recollection? What class, the South Carolina state class was certified when?

MR. SPEIGHTS: It was certified several weeks before the bankruptcy, Your Honor.

THE COURT: All right.

MR. SPEIGHTS: And it was certified after years of contentious litigation. It was certified after an evidentiary hearing in September, the year before the bankruptcy. There was an extension -- in which live testimony was taken of a number of witnesses, number of distinguished witnesses on both sides. Grace got an extension to file one more brief until after the transcript was prepared. The transcript took months to prepare. Once the transcript was prepared, the Judge entered an order as to Grace certifying it. They somehow claim that it was -- and this is a judge who'd heard everything, okay, that somehow there was something wrong about it.

Well if Your Honor's inclined to go down that path to second guess the South Carolina judge of what went on, we have a motion to unseal the record. The Court in South Carolina -- actually it's to allow us to go South Carolina to ask the judge to unseal the record because after those contentious proceedings the South Carolina Court put the record under seal.

THE COURT: Excuse me. Mr. Speights, pardon me. I

have -- there are two very brief calls that I have to take today, but this is one of them. I shouldn't be more than five minutes.

MR. SPEIGHTS: Thank you, Your Honor.

(Recess)

THE COURT: Be seated. I'm sorry. I did call my husband while we were gone, and apparently I cannot handle the Coca-Cola matters, so I will have to transfer them to somebody else. And I will get a Judge for you promptly, but right now I don't know who that will be.

MS. BROWDY: Thank you, Your Honor.

THE COURT: So I think what I -- it would make it easier if I -- if the debtor could simply break out the Coca-Cola into a separate objection, and I don't care if you call it 15A or whatever, and then, Mr. -- and perhaps give me a list of all of the documents that refer to that objection, including Mr. Speights's response so that we don't have to have you refile anything except that -- the new objection and link all of the old documents to it so that whoever the new Judge is will just have a package.

MS. BROWDY: Thank you, Your Honor. We'll do that.

THE COURT: Okay. Thank you.

MR. SPEIGHTS: And, Your Honor, would it be appropriate to strike from the transcript of the record, at least put it in the seal or something, your comments about

those claims? That allows us (indiscernible) around the asbestos (indiscernible) and I don't know.

THE COURT: Well, I think I've already ordered that you can't use it for any purpose with respect to this -- whoever's going to sit on the case, so I don't know how to go about sealing a part of the transcript. I guess what I have to do, Mr. Speights, is have somebody order the transcript and then ask that the portions that refer specifically to Coca-Cola be put into a separate document that can then be sealed, I guess.

MS. BROWDY: But, Your Honor, the problem is, I mean, there are other things in the transcript from yesterday. The parties have already agreed not to use the Coca-Cola statements with respect to the Coca-Cola argument. We agreed on the record yesterday. There are other provisions in that transcript from yesterday that'll -- that we're going to need to look into, when are deadlines, what are page limitations, et cetera.

THE COURT: No, I said to have the transcript prepared in such a way that every -- all the references to the Coca-Cola things are excised into a separate document.

MS. BROWDY: Right, but our main concern would just be that that not slow down the process of getting the transcripts.

THE COURT: Well, I don't -- I don't know what

(indiscernible) slow down the process. I think, Mr. Speights, this would be the best. Perhaps let's get the transcript. Then if you can file something with me that delineates the pages that you would like excised from anything that's going to go to some other Court, although I don't think any other Court's going to look at this transcript anyway because why would they care, but --

MR. SPEIGHTS: I'm sort of our of my element. Maybe I'm -- maybe (indiscernible) has (indiscernible) idea how to do these things in bankruptcy --

MS. BROWDY: -- and --

MR. SCOTT: All you have to do is say on the record now (indiscernible) comments (indiscernible) --

THE COURT: Okay. All those -- I think I said that yesterday, to the extent that I have that conflict, that all of my comments are of no moment on this -- in this case because I'm not ruling. So, yes, my comments are, with respect to Coca-Cola, I guess are vacated. How's that? They're all vacated, and therefore they're of -- to be of no use. The parties have already agreed not to use them for any purpose. I don't -- I really don't know what more can be done at this point.

MR. SPEIGHTS: Well --

MS. BROWDY: Again, Your Honor, I think there's nothing else to be done on the transcript. Mr. Speights has

these claims. He's admitted that he doesn't have product identification. He knows it's a requirement. What he could just do is withdraw the claims, and that wastes everybody's time and money to go before another Court --

THE COURT: Well, look --

MS. BROWDY: -- if he's now willing to do it, we'll do it.

THE COURT: -- it doesn't matter -- Ms. Browdy, there's no point getting into this. I can't rule on it no matter what he does. So it seems to me that that issue will be addressed by some other Judge. My comments with respect to Coca-Cola, the questions I asked and the argument that took place, are all stricken. It's to be started over again. But I don't know how to excise it from the transcript and still have a transcript that will be meaningful for anybody's use, including yours in the future, because of the integration of the Coca-Cola arguments in various sections of the transcript. So they're stricken. They're to be of no use. Anybody who does attempt to use them for purposes of arguing with respect to this Coca-Cola issue in front of another Judge will be subject to contempt sanctions by this Court. That's the best I think I can do.

Okay. Mr. Speights, I apologize for the interruption. You were at -- you were going to file a motion, or you had filed a motion, to ask the South Carolina Court to

unseal the record?

MR. SPEIGHTS: Yes, Your Honor. You had asked me what is it I wanted to do because (indiscernible) my situation today is not here at the final hearing but trying to get a record so I can argue with a final record. And I did think of one thing over the break, if I can retrace about three steps, and that is the fact that I believe Grace served a number of Libby claimants by post office box address, so it's certainly -- and I think that's in our brief -- knows how to do that. And that was an appropriate way in that circumstance. I'm sure they will try to distinguish the situation.

Here's where I am today. And there's so many things I could argue and so many things I feel fervently about with respect to class action. But I'm really at this point with respect to the South Carolina class, a certified class prior to the bankruptcy, which Your Honor has commented on in the past, has been quite distinct from my wanting to get the rest of the world certified. Grace has the burden of proof to come in here and tell you why you should not honor that class action. In fact, I think it's entitled to full faith and credit. In fact, I think it's entitled to res judicata. In fact, I don't think they can go behind it. But if there is going to be argument on that in which they continue to make factual assertions, okay, or challenge me in any way on that I need to have the record that was made in South Carolina over days unsealed so I can

bring it and put it as part of this record. What happened there was the Court became concerned about certain statements which were made which turned out to be, according to the Court, not accurate, and it sealed the record. The Court sealed the record. And then Grace declared bankruptcy. And I think the Court will, presented with a short motion, quickly unseal the record. I'll be glad to serve breaks down there, however you do it, and not violate any stay if you want to lift the stay, and so I can at least say, Your Honor, everything they're saying about South Carolina is patently wrong and here's the record that proves it. And so South Carolina at least my certified class action lives when I struggle for it down there for almost ten years.

Now we have the rest of the world, and it -- and it -- Your Honor's going to recognize it. We don't need to go there with that discovery. With the rest of the world, Your Honor, we think we're entitled to certification regardless of whether or not they gave this notice. But I told you two hearings ago, I think, that I recognize that if I could not convince you of this I would have a more uphill fight to convince you to certify a class, and I did so because I think the cases recognize this is a strong factor in your favor if you show that people who are entitled to actual notice did not get served. And so we have a choice.

They make statements in their -- this is a statement

in their brief. It's before you now. This is the record I'm facing. There is absolutely no evidence that any creditors were not provided notice of the bar date in some form. Now maybe they mean constructive notice and maybe they mean actual notice. That's another one of those ambiguous sentences. They make the statement, this included mailing individualized notice packages to over 200,000 potential claimants or their counsel. Are they saying they gave 200,000 packages to asbestos property damage claimants? I don't know. I need -- first choice is I just need to pin this down with the record so we can come to grips with this one way or the other with a factual record and don't go arguing on an incomplete record and don't go to some Appellate Court with an incomplete record, whoever decides to go to the Appellate Court.

Of course, Your Honor, what I'm arguing for, however, is not only for my benefit. You know, we have two different issues here. Their interest is to give the minimum notice required for due process. That's what -- I mean, they want their bar date to survive. They want it to meet all due process so it can't be challenged and so the estate is protected. And that's a laudable goal. All right? And I'm a claimant in this estate -- my clients are, and we want the estate protected. So I join in that goal that we don't want this estate attacked down the road -- people who have claims who claim they did not give notice, and we believe this makes

the debtor vulnerable. So in that regard we're on the same page. I believe there is a threat to the estate if there's a large number of claimants who did not get notice.

But the other difference is that we're fiduciaries for people in or putative class, Anderson is. So in addition to providing whatever minimum due process might be required to give notice Anderson in addition wants to make sure that it fulfills its fiduciary duty by seeing that all people within its putative class who could have gotten actual notice did in fact get actual notice. And maybe I'm going in circles.

The bottom line is for the putative class at this point -- and I'm going to sit down because I'm not arguing merits yet, if we get to the merits I've got a lot to argue about, unless Your Honor wants me to address it -- at this point we either want a recognition that a class action would serve in the best interests of this estate because it would take care of (indiscernible) my view it a probability that people did not get actual notice or, which I don't think I'm going to get the first, simply to be able to show you in a factual record what I'm talking about, have it blown up, put it right down here, and for about 30 minutes show you, this is what they had, this is what they had, et cetera, et cetera, and do that. And once we have that we can argue the merits of this. And I might have other evidence as well (indiscernible) evidentiary hearing as well as that. That is fundamental

according to the cases in this area which have considered the question.

THE COURT: Ms. Browdy?

MS. BROWDY: thank you, Your Honor.

THE COURT: I'm sorry. Mr. Baena, is the Committee taking any position with respect to this?

MR. BAENA: -- no.

THE COURT: All right.

MS. BROWDY: Your Honor, I'm going to -- my I hand out one chart?

(Pause)

MS. BROWDY: Your Honor, may it please the Court, when Mr. Speights surfaced with his motion for class certification in October we were here for a hearing. And the debtors told the Court then that this motion was absolutely frivolous, that it was designed solely to delay the process of resolving Grace's Chapter 11, and it was thrown in as a stumbling block exactly as we were finally making progress on the property damage claims. And we argued, Your Honor, that Mr. Speights shouldn't even be permitted to file the motion for class certification. The Court disagreed and thought that there were a couple of legal issues to be addressed. There are legal issues. The parties have fully briefed those and I'm here prepared to address them, and we believe, again, based on the law this motion for class certification should be denied

and it should be denied today.

In order to understand these issues, though, first I want to talk just in terms of the time line of how we got here because I don't really think it's possible to understand the class certification motion in a vacuum without seeing how it fits into the big picture. And then after we walk through that I want to address three legal issues. One is the requirements of notice in the Third Circuit. Second is the issue of judicial estoppel in the Third Circuit. And last is how Bankruptcy Courts treat class actions. It's certainly not entitled to full faith and credit as Mr. Speights suggests. But let's start by walking through historically how we got here.

As the Court is well aware in 2001 and 2002 there was extensive briefing and hearings on the notice and bar date issues. And I note that Mr. Speights made a big point of saying, you know, the Anderson case started in 1992 and there's all this work was done up till 2000 and the like. So he was well aware of these issues as a member of the Property Damage Committee. This is not some surprise that just happened in 2005. Speights knew in 2001 and 2002 that there was full and detailed briefing and hearings on the issue of a notice and the bar date.

At one of the arguments on this issue, Your Honor, the Court stated -- and we cited this in or papers -- that

there will be no class proof of claims without this Court's permission in advance. I think it was actually stated twice on the record. It was during Mr. Baena's argument and Mr. Speights was present in the courtroom when that took place.

In April of 2002 the Court approved a four million dollar actual and constructive notice program. The Court expressly made the finding as required that the notice was adequate. Again, it was ordered after full briefing on this, after hearings. Two hundred thousand individual notices were provided and publication was given in dozens of journals. In fact, the question came up whether more notice should be given, for example, on television spots, and the Court said, no, there's plenty of notice here. There was the finding -- again, the April, 2002 order said notice was adequate.

As one of the provisions of the notice program the debtors asked for a requirement that the counsel for property damage claimants either certify to the Court that they had notified their clients or potential clients of claims or -- of te -- of the bar date, or that they give the debtors the address information. They didn't want to spend the time and money, give us the addresses and we'll notify them. And the Property Damage Committee came into court. Mr Baena argued it. Mr. Speights is part of that Committee, and this -- the Committee came in and asked the Court to abate that requirement. And again we cited that portions of that June

transcript in the brief that we filed on January 13th, and they said, don't make us do it. And again, we had asked that they either certify that they had notice -- notified their clients, potential clients, or give us the addresses. And they said, don't make us do it. They represented to the Court that it was unnecessary, and the Court in September of 2002 adapted the abatement request that the Property Damage Committee had made.

In March, 2003, Your Honor, at the bar date Speights did a number of things. He filed class proof of claims 9911 and 9914 for Anderson, South Carolina in state buildings or out of state buildings that -- one was for South Carolina, one for -- was for the others, in direct violation of the Court's admonition that there will be no proof of claims for a class without permission. He also then filed thousands of individual proofs of claims for individuals we later learned he didn't even represent, but he filed individual proof of claim forms. That meant he had the address information. Byers Machinery is an example. He had that address information. It's the exact kind of information the debtors had asked for to give notice, and the Property Damage Committee came in and said, don't make us give us that information, they don't need to give them actual notice. Again, this is what they got the Court to abate that requirement.

And in March of 2003 in addition to filing, again, nearly 3,000 proofs of claim, including these two class proofs

of claims, Mr. Speights never moved for class certification. It took us a while, Your Honor, to dig through the thousands of claims that we received in this bankruptcy. Remember, at the time Grace went into Chapter 11 there were only about seven property damage claims pending, and lo and behold 4,000 were filed. It turns out 3,000 of those, again, had been filed by Mr. Speights. And it took us, again, months of discovery, briefing and the like to find out that these 3,000 claims that Speights had filed he didn't have authority, they had false information --

THE COURT: Ms. Browdy, I am so tired of hearing this, for Pete's sake. The fact that you've repeated it for 18 times doesn't make it any more true than it was the first time. Please --

MS. BROWDY: Okay.

THE COURT: -- let's get to the merits of this.

MS. BROWDY: Okay. And then here's the merits. By October of 2005 2,300 hundred of his claims are gone. So he's no longer the big fish in this pond with 3,000 claims overwhelming everybody else. Twenty-three hundred claims of his are gone. The dynamic of the settlement process and the like is changing. He's again getting boxed out because so many of his claims are gone. And what does he then do? Two years after the bar date, four years after the notice issues, that's when he moves for class certification. It was prompted not by

any concern for these Anderson and Royal claimants, it's because, again, he wants to get leverage. That's the only reason this class proof of claim has been filed. And what's interesting is his motion for class certification -- and this is stunning -- he attaches as his Exhibit A, here's a thousand claimants that we think were not properly noticed. That's the root of his argument here. They're the exact list of claimants that he already filed proof of claims for and they're the exact people who are listed on his claim forms 9911 and 9914. These are not new names. This is what he had in his pocket. He had that since 2003. And I can hand this up to Your Honor.

(Pause)

MS. BROWDY: Your Honor, this is what Speights is complaining about. We went through everyone on his list attached as Exhibit A. They're contained on this -- on this handout. And we list the Anderson -- the claim number that was used for the individual filing in this case and we show you where it appears in 9911 or 9914. He hasn't found new stuff. He was sitting on this. This is the information he had back in 2003. He's now sought to get additional discovery with the Sam Anderson Memorial. He's tried to push over this hearing. And again, we think that as a matter of law this motion should be denied. And now I want to get into the legal issues.

First on the question of notice, which is what this Court had us brief most recently, this is -- the argument is

sketched out in our supplemental brief filed on January 13th, docket 11547. The Third Circuit recognizes there are two types of creditors, known and unknown. Known creditors get actual notice. Unknown creditors get constructive notice, publication notice. That's the Chemetron case, 72 F3d 341, the Third Circuit, 1995. So the question then becomes for these claimants on Exhibit A of Speights' motion are they known or are they unknown creditors?

Mr. Speights said, gee (indiscernible) could they have served but they didn't, how easily could it have done? I suspect that there are more people out there. I think they have a database. That's not the question. This is a question as a matter of law. And again, the cases are cited in our briefs. As a matter of law unknown creditors, unknown creditors, only get publication notice. And that shows, again, that -- the cases show we have no duty to go through all of our books and records and invoices and materials going back decades to give notice to every customer, supplier, vendor, et cetera, that we had 30 years ago. We only have to give it to known creditors. That's people with a claim and people who have given us notice of their intention to file a claim. And none of those people have done it. And Speights has had years and he comes up here, I suspect, I think, I think they have more. Where's his scrap of evidence that any of these people had a claim at the time or had notified Grace of a claim at the time?

That's the standard.

And again, it's a question of law. It's the issue this Court already addressed as part of this notice program briefing back in 2001 and 2002. We have to go back to known creditors, not to every customer we ever had, not to every invoice we ever had, not to every billing slip we ever had. That would be ridiculous. No Chapter 11 could ever move past the step one if every debtor had to go back and find every single slip of paper going back decades. And it's even more egregious, Your Honor, this contention of Mr. Speights, when you consider that property damage litigation went back to 1985. By 2001 there were seven claims pending. Again, we had never gotten intention from any of those individual claimants, any of these individual building owners listed on Exhibit A to say, I have a claim against you, I'm filing suit. Why didn't they file suit? Again, we had no obligation to do it. Speights's contention, gee, I think there's more, they could have done more, is completely frivolous. Where is the basis for his discovery? He can't get it because it's a legal issue. The Court doesn't need briefing on that. Again, the Court addressed the issue in 2001 and 2002.

Which then turn -- takes us again to the judicial estoppel argument. The Third Circuit reads judicial estoppel broadly, in fact more broadly than a lot of other places that I've had to litigate it. The Motley case, it's 196 F3d 160,

the Third Circuit, 1999, notes that judicial estoppel is there to preserve the integrity of the judicial system. It's to prevent parties from playing fast and loose with the Courts. They cannot take inconsistent positions, and the Courts should take a look and decide each case on its own individual facts.

Again, Your Honor, you go back to the abatement request. He had this list of addresses. This is exactly what we said. You want to give us additional information, people you think should have notice, we'll serve them. The PD Committee, of which Speights is a member, came and said, don't do it. He's judicially estopped now from turning around and saying our notice program wasn't adequate because it didn't give notice to people we said don't give notice to. We're not going to give you the information to give notice to. And the Court again doesn't even have to reach the issue because as a matter of law we had no obligation to give these people notice because they're not known creditors. They were -- received notice by the constructive notice program. But again, the Court has a second ground for denying the motion, which is judicial estoppel under Third Circuit law.

Now, Mr. Speights says, gee, I wasn't a party to that, it was the PD Committee. The Ryan case, which is cited in our opinion, shows you don't even need privity in the Third Circuit. The Ryan case is 81 F3rd 355, the Third Circuit, 1996. But he certainly can't stand up here as a member of that

Committee when the Committee proffered this position and then tried to come and turn it 180 degrees around. That's exactly what judicial estoppel is designed to prevent. He should no be permitted to go forward with this motion.

This gets us to the third and final legal argument, which is what does a Bankruptcy Court do when it gets a class proof of claim? The first thing, Your Honor, is it's obvious that it doesn't apply full faith and credit. If it was a full faith and credit analysis, Your Honor, you never would have the history leading up to the American Reserve decision. There wasn't -- there were -- there were questions for months if not years as to whether a Bankruptcy Court even could permit a class action to go forward. And if State Court class actions were entitled to full faith and credit you would never have had that line of cases leading up and following American Reserve because the question comes up again, can a Bankruptcy Court even permit class actions to go forward?

But as the American Reserve and other cases developed a couple of basic principles became clear, or I think that they were clear. They were spelled out in our brief. One thing is the Bankruptcy Court has discretion to figure out whether or not to permit a class action. And one of the key factors to consider is the effect on the progress of the bankruptcy. That's the American Reserve case and the In Re Zenith case. And it says, for example, these cases point out even if you had

a class certified outside of the bankruptcy it may not make sense for it to go forward in the context of the bankruptcy. The Court has discretion. You look at what is the effect on the bankruptcy process. And here I submit, Your Honor, where we had notice and bar date issues briefed four years ago. A four million dollar notice program has taken place. Thousands of claims were filed by March of 2003. We've now taken all these steps to get it down to a matter of hundreds of claims. We're in the midst of estimation. We're in the midst of our objection process. To go and now to open the door to change the issues, to change the notice that the Court has already addressed years ago, would impede. It would not advance the progress of the bankruptcy at this point, and that's again a key factor for this Court to consider.

A second issue that again becomes clear in the case law is the timeliness of the filing of the motion is a factor for the Court to consider. And again, we submit, Your Honor, when this was briefed and addressed in 2001 and 2002 and the Court said, you're going to have to get permission to file a class claim, that Speights went ahead and filed it without permission and then waited two years, actually more than two years, to try to bring the class claim. That's an important factor for this Court to consider. It's just not timely.

But the third point -- and again, this is spelled out in the opening brief that we filed on December 2nd -- is that

Courts have repeatedly rejected class actions in a bankruptcy where notice and the bar date had passed and the individuals have already been given an opportunity to file the claim. That's the Bicoastal decision, 133 BR at 255. That's the First Plus decision, 248 BR at 73. It would be inequitable to allow a class proof of claim to stand by giving a second bite at the apple to those who chose not to file. It's the In Re GAC case, 681 F2d 1295. And it's the Sacred Heart case that Mr. Speights cited to you, 177 BR 16 at 22, where the putative class had received actual or constructive notice denial of the class proof of claim device was deemed advisable. So repeatedly, case after case, where Bankruptcy Courts are given the opportunity to consider certifying a class after notice and a bar date have passed they turn it down.

And the last case I'd point out to Your Honor is one of the cases cited by the plaintiffs. It's In Re Charter, 826 F2d 866. It's an 11th Circuit case from 1989. And what's interesting in that Charter case, again, cited by Mr. Speights, that Charter distinguished the circumstances of that case from GAC because they noted that in GAC the bar date order entered by the Bankruptcy Court rejected class proof of claims and required individual proofs of claims and said that was within the Bankruptcy Court's discretion. The Bankruptcy Court has discretion not even to permit class proof claims. And, Your Honor, I submit that that's what this Court did in February of

2002 when they said, you're going to need permission before filing. So again, we think as a matter of law it's time to deny this motion. There's no basis for it.

And again, the question isn't, can we get discovery, who may have gotten notice, what other things were in your files, it's a legal standard. The legal standard has been set out by the Third Circuit, was there a known creditor? That was discussed at length in 2001 and 2002. It was briefed. It was argued. Speights hasn't come up with a single shred of evidence saying, here's a known creditor, someone who meets the standard under the Third Circuit, who didn't get notice.

This discovery request is a fishing expedition. The attempt to open up the Anderson Memorial case down in South Carolina is a fishing expedition. It's all designed to delay at the same time that Speights' claims are being thrown out by the hundreds and thousands.

THE COURT: All right. When was the class certified in South Carolina? Was it -- do you agree it was pre-petition?

MS. BROWDY: Your Honor, we briefed this as part of the Anderson Memorial issue. First of all, the out of state claimants in South Carolina, that class was never certified.

THE COURT: Right. I understand.

MS. BROWDY: Okay. For the South Carolina claimants Speights ran in in February and got an ex parte conditional class certification order. Again, it would have February,

2001. To the extent that there was a class certification decision it came out in July of 2001. It violated the bar date -- or the automatic stay as to Grace. So there was no cognizable class certified as to Grace ever in the Anderson Memorial class action. But to the -- to the extent that any class would be recognized in that case, again, it was certified in July of 2001. Again, we think that order was ultra vires as to Grace. And I believe that Mr. Speights has even conceded that it did not apply to Grace because we pointed out that by a letter that Mr. Speights introduced to this Court Speights drafted the order for the South Carolina Court, and he could not have done that in the Grace case. That would violate the automatic stay. He would be subject to sanctions if he had written that order to bar Grace -- to apply to Grace at the same time the automatic stay applied. We brief that issue, again, back in October. I can get those cases again if you need it.

THE COURT: No, I just am -- I want to make sure I understand the facts because Mr. Speights argued that it was certified pre-petition but my recollection was that the issue came up as to whether drafting an order for another Court to sign was in fact a violation of the stay. I don't think I ever had to get to that issue. But I thought that the order that came down specifically excluded Grace from the certification because the Court was concerned in -- the South Carolina Court

was concerned that if it included Grace it would be in violation of the stay.

MS. BROWDY: Right. And again, there was a one-paragraph conditional ex parte class certification order entered in February. But the actual final class certification order, again, was entered in July of 2001, after the automatic stay. It had to carve out Grace, and again, if it didn't we would suggest that Mr. Speights is subject to sanctions for having drafted it in violation of the stay.

THE COURT: All right. Well, I don't know what the -- I don't recall if I saw it. I probably did. I just don't remember what this conditional order in February was. So can somebody get me a copy of that order, I want to see that, and then again, the July order?

MS. BROWDY: We can get that to Your Honor.

THE COURT: Mr. Speights?

MR. SPEIGHTS: Just on that one point, Your Honor, here's what happened. There was a conditional order ex parte when Grace announced it was thinking about bankruptcy. Before it filed bankruptcy there was a hearing in which Grace was represented by its national and local counsel. And after hearing fully with the parties the Court decided to continue that order. So it's not like I ran up to see the Judge, who's 200 miles from where I live, hand him a piece of paper and, what do you want, Mr. Speights? There's nothing to impugn the

integrity of this Judge, one of the best Judges that I

THE COURT: Well, an ex parte order getting a class certification after a trial's a pretty difficult thing to swallow, the other side, Mr. Speights.

MR. SPEIGHTS: I understand, and that's why I want to unseal that record, Your Honor, because it will show you that the Court had this extensive record already. Okay? And when we -- and it will show you that there was a basis for going to the Court ex parte with -- it's like a TRO in a child custody case, what am I going to do with the child pending a hearing? There was a hearing, before the bankruptcy, and the Court decided that it should certify the class, continue the certification as to Grace after being heard by everybody. And then a few weeks later the final order is entered as for everybody but Grace.

The word, conditional, I might say, Your Honor, has -- it's not -- it's not a term that I should be hesitant to use, or anybody else. All class actions are conditional. It's typically -- I think it's in the National Schools class action, which was upheld by the Third Circuit Court of Appeals. So that means nothing that it was conditional. I imagine the last order was conditional. My (indiscernible) was conditional.

So a Judge hears -- and again, that's another reason why we can unseal the record, and I think you will see what the Court had before it. And this thing about I draft the order,

Grace drafts orders in the same sense. The Judge writes a lengthy letter, says, you got to type this, you have them type up, this is my order, and circulate it and everybody comment on it, and when everybody comments on it I'll put it in final form.

THE COURT: Yes, I'm not concerned about the fact that you drafted an order when a Court directs you to draft an order. It's still the Court's order, it's not your order, Mr. Speights. And whether you're the scrivener of it, you know, as it gets to the Judge or not, so that's not my concern. I want to understand the process and what happened pre-petition. So I would like to seethe orders that the Court entered, all of them, with respect to the class certification with respect to Grace. I don't care who drafted them. I do care that the Judge signed them. So I want --

MR. SPEIGHTS: And I'll be happy to supply those to Your Honor.

THE COURT: All right.

MR. SPEIGHTS: And I have them, and I will do so. Let me fall back to the -- to the sum of the rest of the argument. If I talk as fast as Ms. Browdy I couldn't go every point she made before two o'clock but I want to get to the essence of what I think we're here about today.

While on the one hand Grace talks about there are no factual disputes, we should rule today, Ms. Browdy makes

numerous factual assertions, including at one point there's not one scrap of evidence to show such and such. That's her language. Well, I just want to get this record straight. I'm like a broken record. I want to put some scraps of evidence into the record because throughout their brief, throughout their argument, they constantly say things that I sharply disagree with, including just a moment ago about the state of this record in South Carolina, suggesting that there was an ex parte order and then there was a bankruptcy, leaving out the critical middle step that there was a hearing in between the ex parte order in which Grace had a chance to argue the case in full. So again --

THE COURT: Is that the record that's sealed?

MR. SPEIGHTS: The -- I don't believe that portion is sealed. I can give you the orders. What's sealed is what the Judge had before him when he entered all those orders.

THE COURT: Okay. Well, at this point in time, frankly, I don't know that I need that. If there -- if there is a transcript that's not sealed of the hearing that took place after the ex parte order was entered and before the conditional continuation order, whatever that order was, I would like to see that transcript. If not then I'll take the orders. If it's under seal -- if the transcript's under seal I'll take the orders.

MR. SPEIGHTS: And I will get that to you, Your

Honor. And in addition, one more thing on facts. Somewhere throughout here they say this was done late, they waited three or four years, we didn't do anything about it, we were shocked to discover it, et cetera, et cetera. We have also served, I forgot to mention a moment ago, discovery which will show that Grace has been acutely aware of Anderson's claim throughout this bankruptcy from the very first when we believe we can show through this discovery that Grace successfully kept Anderson off the Committee by violating the South Carolina Court order, by violating the seal order and giving Mr. Perch, the U.S. Trustee, information that was under that seal order, and we got the record corrected before Mr. Perch and will add it to the Committee. So this is not contrary to the briefs and these naked assertions, this is not, we had no idea, Mr. Speights comes along four years later and files Anderson, we were shocked, et cetera, et cetera.

THE COURT: No, I don't think that's the point. I don't think there can be any dispute about the fact that Grace knows what Anderson's claims are as they were litigated in the South Carolina proceeding because it was there. The issue is whether or not the class proof of claim violates my order that said that before you file a class proof of claim you get authority. Whether it does violate that order or not at this point, frankly, is irrelevant. Whether it meets the standards for class certification is what I'm concerned about. And

here's the problem that I'm facing. There was a bar date, and for purposes of this discussion I'm just going to make an assumption, I'm not making findings, that the notice was appropriate because I made a finding earlier that the notice program was appropriate. So for purposes, again, as I'm saying, all I'm doing is making a hypothetical right now, assuming that the notice was appropriate for creditors then I have the whole panoply of property damage claims filed before me with the exception, of course, of the zonolite issues, which we haven't addressed yet. But but for the zonolite property damage issues we have all of the property damage claims that are ever going to be able to be filed because there was a bar date and it's gone. And frankly, at this point there just aren't enough of them that I can see that it requires a class. So that's where I'm coming from.

I don't see how a class is going to advance the cause of the bankruptcy at this point in time. The objection process is ongoing. To the extent that the Canadian litigation is going to take place somewhere, that's not a large number of claims and it can be done here, it can be done in Canada, it'll be done somewhere, and that's the bulk of the claims that are left. There are not that many claims left. I really just don't see the need for class certification in that sense.

To the extent that there are real live creditors, current creditors, who should have gotten actual notice but

didn't somehow get actual notice I think the answer to that is to give them actual notice and see if they file claims. I don't see why I need a class action for that purpose at this point.

To the extent that the creditors on claims 9911 and 9914 are the same creditors that you say are current claimants who didn't get notice, that was the whole purpose why the debtor wanted to get counsel to say who you had notified or to get -- when I say, you, I mean that in the plural sense -- who were notified or to get addresses so that the debtor could give actual notice. And the fact that the debtor's stymied in that effort because the Committee got an order that applies to all counsel and nobody appealed, so it's a final order, that says that that information doesn't have to be given to the debtor means, I think, that the debtor's done everything it could do. It came into court and argued against this order, and it lost because the Committee was persuasive and it applies to all counsel. And service list includes you, Mr. Speights, personally, not as a member of the Committee, and you didn't appeal it. So at this point in time I think, you know, you make your bed you lie in it.

Now, with respect to the actual notice issue I think we need to take a look at the certification that was filed by the claims agents -- oh, I'm sorry, the noticing agents to see who was served. Again, I apologize. This is going back too

many years and I wasn't the Judge originally assigned to this case so I'm not sure I even know this piece of information. The debtor's schedules, do the schedules list the current property damage claimants?

MS. BROWDY: I would ask if my partner, Ms. Baer, is still on the phone, because it was before I was involved as well.

MS. BAER: This is Janet Baer on behalf of the debtor. The debtor's schedules would have listed all of the pending property damage litigation, which is of course all of the people who would have been served, or their counsel, with the bar date material.

THE COURT: Okay. Do you know, Ms. Baer, whether they included the people who were putative class plaintiffs in the Anderson case, the South Carolina Anderson case?

MS. BAER: I can't say specifically. It's been too many years.

THE COURT: Okay. Can somebody check? Because if they in fact were served with actual notice, I don't know that the debtor even knew who all those plaintiffs were. I don't know the status of the South Carolina litigation. Were all of the putative class members identified in South Carolina?

MS. BAER: One thing -- one thing I can say, Your Honor, is we notified their counsel, Mr. Speights. That's what

our requirement would be.

THE COURT: Okay, yes, as the putative class counsel for the Anderson claims.

MR. SPEIGHTS: Actually it's certified class counsel for South Carolina.

THE COURT: Yes, for South Carolina. All right. So in fact they do have notice because you had notice and you represented them.

MR. SPEIGHTS: And I filed a class proof of claim.

THE COURT: Right, which I said you couldn't do, they needed to file -- until you got a motion approved.

MR. SPEIGHTS: Well, I'm ready to (indiscernible) there's a lot I need to address, Your Honor. I'm not sure where we are, but --

THE COURT: Well, I was trying to get to the question of whether or not I need some discovery with respect to the notice program. And at this point, frankly, I'm not convinced that I do. I think that issue maybe we should take a look at for February. You need to look at the certification, Mr. Speights, and see this list of 200,000 claimants and find out whether in fact these claimants were notified, and if they weren't why not when you were their counsel and could have notified them, I think is the issue. So --

MR. SPEIGHTS: Well, if we're going to deal with that in February I'm not going to prolong -- I understand where you

are -- I'm not going to prolong things now by hopefully effectively refuting everything Ms. Browdy said and by hopefully convincing you about a couple of things, especially about what Your Honor said at that previous hearing. I understand what your focus is. The focus is, it seems to me now, are we entitled to discovery or not? And just in fairness to me every now and then I like to fair to myself, Your Honor, when Ms. Browdy comes up and said, delay, delay, delay, I served this discovery in December. We'd already be finished with it. It's not something that's going to take a long time. They filed a motion for protective order, which they have every right to, and that's the way the game is played. And under the local rules I haven't been able to take that discovery. And I believe with the discovery already served, you know, provided they respond to it adequately, we would be in a position to argue the merits of every aspect of this, which is sort of like punching a balloon, when you punch one side of it another side pops out. But I want to get my arms around it and have it resolved.

THE COURT: Well, I agree with Ms. Browdy's statement with respect to the standard. The debtor is not required to go through every piece of paper in its possession to determine whether 30 years ago it shipped product to a place and therefore the entity who got it 30 years ago may still be the owner of a building who received the product and used it and

had some knowledge that there was a hazard. I think they do have an obligation to make a reasonable inquiry as to who the creditors of the estate are. And so to the extent that the issue, if this is the issue, is the list of creditors that were on the 9911 and 9914 proofs of claim, and whether or not they got actual notice, I think there can be a comparison between what the noticing agent did and what the creditors are. To the extent that you were served on their behalf, that's sufficient notice. You have an obligation to notify your clients that they have an obligation to do something as their counsel, and that's sufficient notice. That should have happened. So hopefully that's not going to become an issue as to whether counsel did or didn't notify their clients because otherwise I'm going to vacate this order that I entered several years ago and get those certifications filed. I don't know how else to address the issue as to whether actual notice was provided by the attorneys to their clients. So that's where I am.

MR. SPEIGHTS: And --

THE COURT: Either this order has to be vacated and we find out who was served. And if there wasn't service then I'll make the attorneys make the service.

MR. SPEIGHTS: And, Your Honor, as we sit here today I tell you that there's nothing in the record to suggest that Grace could not get on the computer and hit a button and print a list of addresses (indiscernible).

THE COURT: And there's nothing on the record at this moment to say that Grace didn't do that.

MR. SPEIGHTS: I know, and that's --

THE COURT: There were --

MR. SPEIGHTS: -- why I need the discovery.

THE COURT: -- there were representations, I believe by Mr. Bernick, before the notice program was put in place as to what effort the debtor was going to make to identify creditors, but I don't have a recollection specifically of what that was now. I do recall one of his charts, talking about some things like that, but I don't recall --

MR. SPEIGHTS: And that's what I want to challenge, and --

THE COURT: So go back and we'll --

MR. SPEIGHTS: -- in the most respectful way I want to challenge it in discovery. I just got -- this is an amazing world we live in where you can be up here arguing in Pittsburgh and get an e-mail from somebody out of state by your Blackberry, and -- but since we don't have the record, somebody has reported who has looked at the list Ms. Baer identified us for earlier, I think that's the list, of the 265 pages of PD names about 9,700 on the attachment, at least 200 pages of names are Libby or other Montana addresses sent to current occupant or current resident. The actual names are very small.

THE COURT: Well, with respect to Libby we addressed

that issue way back when, too. And I believe that -- I think I ordered the debtor to send notice to everybody who lived in Libby because I want to make sure that there was some universe of people. But, Mr. Speights, Libby is a whole different circumstance from having, you know, an isolated building somewhere outside Libby, Montana that has a Grace product in it or some other asbestos product in it. It's just not -- it's simply not the same kind of circumstance.

MR. SPEIGHTS: But whether it's apples and oranges or orange and tangerines, first of all, this long list is consumed by Libby -- I said, you know, we talk about now being a part of this record -- it's consumed by Libby. Secondly, it shows that when you want to give actual notice or the Court directs you to you can send it to a post office box (indiscernible) address --

THE COURT: I'm not sure that's actual notice. That may be constructive notice, too.

MR. SPEIGHTS: Well, and the other thing is buildings don't move. And we don't need to get it --

THE COURT: Buildings aren't claimants. Buildings are not claimants. They have no standing to raise a claim in a bankruptcy case. Sending a notice to a building is irrelevant. If they send a notice to, for example, I'll just pick a place, the U.S. Steel Building that has 60 some floors and 5,000 tenants in it, what kind of notice is that giving to anybody? It's not. It's not notice. It's better to put an ad in a

newspaper that's likely to be seen by at least half if not all of those 5,000 tenants in the building. The buildings are not claimants. And the fact that the debtor has some indication that it's product was shipped to a specific building is totally irrelevant with respect to giving notice to claimants.

MR. SPEIGHTS: Sell, Your Honor, let me just shut up since we're not going to finish today and say that hopefully you'll give -- allow us the discovery. I will send you the papers you requested dealing with the South Carolina certification. And whether you allow discovery or don't allow discovery when we appear before I will address all of those assertions that Ms. Browdy has made and try to convince you (indiscernible) timeliness on which Your Honor ruled in February of 2002, et cetera, et cetera, which, as I understand it, I don't need to address at this point.

THE COURT: All right. You may send me the -- I know somewhere I the docket, Mr. Speights, I've already seen those orders. It's just that at this point in time I really couldn't put my finger on them. If you could send them to me in paper copy and send Ms. Browdy a copy of what you send me, that would be sufficient. You don't have to -- unless electronically filing them is easier, I don't really care. But I just want an opportunity to take a look at those orders and --

MR. SPEIGHTS: And regardless --

THE COURT: -- if it's not sealed.

MR. SPEIGHTS: -- and regardless of the discovery issues relating to notice unsealing that file is a separate issue so that you would set -- I would ask you to think about -- consider the context in which those short orders were entered.

THE COURT: I'm sorry, would you say that again?

MR. SPEIGHTS: In addition to our discovery that we want about notice I would also urge you to consider unsealing the record in South Carolina so that when you consider the orders I'm going to send you, unless you say, oh, those are dispositive, okay, that at least you would have before you what Judge Hayes had before him when he signed these very short orders.

THE COURT: Okay. Well, I don't think I'm in a position to order some other Court to unseal a record.

MR. SPEIGHTS: Oh, we just want you to lift the stay so we can go ask the Judge to unseal the record.

THE COURT: Well, let me see the orders and the transcript of the one hearing that I think at this point is -- may be a bit more crucial to this issue than the whole trial at this point, just the transcript of the hearing between the ex parte and the second order that the Court issued, if it's not under seal. That's what I would like, those three orders and that transcript --

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: -- at this point.

MS. BROWDY: Your Honor, I mean, we were here today to argue the merits of the class certification. I understand you've heard argument, you want to look at these two additional orders and potentially a transcript from the Anderson. But Mr. Speights has made no basis for getting discovery. I mean, that was the whole point, and we -- when we started to flag this issue in October the Court wanted to examine the legal issues.

THE COURT: Well, the legal issue is whether, as I understand what Mr. Speights is arguing, is the fact that the case -- some of the cases indicate that to the extent that the debtor has done an appropriate notification program and the bar date has passed that there is very little basis for a class proof of claim. There may be in some circumstances other reasons to go into it, but for reasons such as face us on this record where the universe of claims is not that large and the known claimants are known, because everybody had notice, if the debtor did not give appropriate notice then the cases tend to say that a class proof of claim may be appropriate even though it may be a second bit at the apple. There are those cases that say you shouldn't get a second bit at the apple, but there seems to be a little bit of a disparity, depending on the facts and how the law is applies to the facts. He wants to get to the facts. His argument's going to be that the debtor didn't give appropriate notice.

MS. BROWDY: Your Honor, the Court's already made a finding that notice was adequate --

THE COURT: I gave -- I made a finding that the notice program was appropriate, that's right. The question is I think a very limited one, and that is, what did the debtor do to get that notice program approved, you know, what kind of investigation was made to get some indication of who the actual claimants are and to notify those actual claimants? I'm not convinced at this point that the debtor needed to do anything more than was done but the question is I don't really know what the debtor did to notify the actual claimants or to identify the actual claimants. I do recall some assertion by Mr. Bernick as to what was going to be done. I don't remember the details. It was just too long ago.

MS. BROWDY: That's why we're digging up that -- the list of notice from the earlier -- from the record that was referred to.

THE COURT: Well, the record that -- that notification -- I'm sorry, that certification of the notice that was provided should list everybody who got from the notice agent the package that the debtor sent out. So you're going to know the list of entities, either known claimants or their counsel, who got that package. The debtor's request way back when was to say, if we send the notice to the counsel we want an indication that in fact they sent it to their clients so

that we can say they got actual notice. They convinced me that they shouldn't have to do that because as a matter of ethics they have an obligation to notify their clients, and so I shouldn't have to make them file that certification. And I agree. They're officers of the court. If there's an order that says, you know, make sure that your clients are notified, they have to do it. Now they -- I agree with you, they can't come in and say, gee, there's no evidence of record because they asked me not to have the evidence put of record because they're officers of the court and I accepted that proposition, and now they want to say, well, the debtor didn't make notice.

You know, you can't have it both ways. So either I vacate this order that I entered back in September of 2002 and require the counsel who didn't want to certify to certify so that there is this record. That's going to be the first step before we go into any discovery with respect to the debtor. That will be step one because the debtor did make notice on several counsel, and to the extent that they had clients they had an obligation to notify them. The disparity may still be that there may be actual known creditors who weren't represented by counsel who were missed. But, you know, unless there are hundreds of them it's not going to make a difference. They got constructive notice. That's the whole purpose for constructive notice. So I'm not really sure where we're going, but the first step is to look at that certification. I may

request some information as to what the debtor did to find out who actual claimants were. And the next step before we go any further, if it's necessary, is going to be to vacate this order or to amend this order, whatever, and require the certification, because the counsel were notified, and to the extent they now want to say that there were creditors who were not notified then I want to find out whose fault it was.

MS. BROWDY: Thank you, Your Honor. Then the only question I -- we have for the Court, we have the omnibus hearing set for Monday. Two of the items on the agenda, one is our motion for protective order as to Mr. Speights' request for discovery, and the other is Speights' request to lift the stay in Anderson, to which we've objected. It strikes me that those should both come off of the agenda for Monday.

THE COURT: I think they should go on to the February calendar, Mr. Speights, to give you an opportunity to look at what I've already directed be done.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: Okay. Put them on the February.

MS. BROWDY: Thank you, Your Honor.

THE COURT: Okay. Have -- is the argument for today finished with respect to this issue, class --

MS. BROWDY: As far as I know -- as far as I know --

MR. SPEIGHTS: I believe so, Your Honor.

THE COURT: Okay. Then I will take up again at the

February hearing whether some if any discovery is necessary, but as I indicated first I want everybody to look at the notice, the certification of the notice that was filed. I would like some recitation from the debtor. For February I will accept it from counsel as a proffer but I do want some representation as to what the debtor did to find out who the actual claimants were.

MR. SPEIGHTS: When is that due, Your Honor?

THE COURT: I'm just going to accept it by way of an oral representation at the February hearing.

MR. SPEIGHTS: At the hearing (indiscernible) get it in advance. I understand. I'm just making it clear.

THE COURT: Because I'm looking to see whether some additional discovery is going to be needed. And then if some additional discovery is needed before we do anything from the debtor we're going to revisit this order, because at that point in time I don't think you can have it both ways, so we'll find out who was served -- or who was notified from their own counsel so we do have a record as to not just the attorneys but the actual clients who were notified. So we'll address anything further than that at the February hearing.

Okay. I've given sort of my preliminary view with respect to the numerosity issue. I really am not convinced that this is that numerous a class but that may be dependent on this actual notice issue, so I'm reserving ruling on that.

With respect to advancing the bankruptcy, unless there is a numerosity issue I don't think it's going to advance the bankruptcy. And even if there is a notice problem I may rather refile -- or have the debtor reserve a bar date for those limited people who didn't get the notice and figure it out from there at this point, but again, that's an issue I'll hear from you on in February. Okay? Anything else for today? Okay. We're adjourned.

MS. BROWDY: Thank you, Your Honor.

THE COURT: Ms. Browdy, I didn't ask you how long it will take you to file that Coca-Cola line of things so that we can -- I can work to get that reassigned.

MS. BROWDY: We can surely get that on file next week, Your Honor, if that's okay.

THE COURT: Okay. That's fine. Sure. By like Friday of next week?

MS. BROWDY: That would be sure.

THE COURT: Okay.

MS. BROWDY: Thank you, Your Honor.

THE COURT: If you would, Ms. Browdy, when that's filed would you call Ms. Baker in Pittsburgh and let her know? Because I would like to take care -- since I have a conflict I would like to transfer that as soon as possible.

MS. BROWDY: Yes, Your Honor.

THE COURT: All right. Thank you.

(Hearing adjourned)

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C E R T I F I C A T I O N

I, BEATRICE A. CREAMER, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Beatrice A. Creamer
BEATRICE A. CREAMER
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February 2, 2006
Date